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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

SYLVESTER H. KNEELAND,
Appellant,

vs.

GEORGE WILLIAM BALLOU ET AL.,
Appellees.

No. 1540.

MOTION TO ADVANCE AS TO CERTAIN APPELLEES AND TO DISMISS AS TO OTHERS.

BRIEF FOR APPELLANT.

ROBERT G. INGERSOLL,
CLARENCE BROWN,
Solicitors for Appellant.

C. G. Burgoyne, 146-150 Centre Street, N. Y.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1890.

SYLVESTER H. KNEELAND, Appellant, vs. GEORGE WILLIAM BALLOU ET AL., Appellees.	No. 1540. Motion to advance as to certain Appellees and to dismiss as to others.

BRIEF FOR APPELLANT.

I.

On the third page of the brief filed herein by the appellee is the following :

> "And thereupon the said Sylvester H. Kneeland,
> "as such purchaser, trustee, agent and bondholder
> "as aforesaid, having this day filed herein his
> "motion in writing, praying a reference to a Mas-
> "ter, upon the grounds and for the purpose in such
> "motion set forth, and the Court having fully con-
> "sidered such motion, &c."

But this Court is not informed upon what grounds

the said Kneeland prayed a reference to a Master, and this Court cannot be informed without referring to the record. As a matter of fact, the said Kneeland set forth several grounds, and, among others, that no computation or report had ever been made by the Master for the several periods mentioned in the decree, and especially for those periods found by this Court to be the periods for which payments should be made.

Among other things, Kneeland set forth that the repairs, for which they asked to be paid—the cars destroyed, for which they asked to be paid—had not been shown by the reports to have been injured or destroyed within the period for which this Court decided that he was bound to pay.

Among the grounds, also, was the statement that the bondholders, with their committees, had requested the owners of the cars to remove them from the road; that their first request was made in October, 1883, and that several requests were made thereafter to the same effect; and that the owners of the cars would not remove them, but insisted on their remaining, and that the bondholders took the ground that the cars were of no use, and so notified the attorneys for the appellee.

Mr. Kneeland asked the Court below to be allowed to prove these facts, and that the case be referred for that purpose; all of which appears in the record, together with a great deal more.

The Court refused to refer the case, and thereupon the appellant excepted.

While it appears in the reports that a certain amount is allowed for a period of eight months, and a certain amount for a period of five months, we contended then, and we still contend, that the Master, in making

the reports for eight months and for five months, distributed damages, repairs and destruction over a certain period of time, and divided by the time instead of finding what actually occurred within each period.

II.

There is also another question presented in the record, and that is as to whether a decree that has been reversed bears interest from the time of its rendition in the Court below—the point being that a decree wrongfully made and afterwards reversed has hardly force enough, after the reversal, to carry interest; and the record shows, among other things, that interest was allowed by the Circuit Court. To which the appellant excepted, and from which he appealed.

III.

The record has not been printed, neither has the appellee set up such portions as will enable the Court to pass upon the motion without an examination of the record. The counsel for appellant insist that the facts are not correctly or sufficiently set up in the brief of appellee, and therefore ask that the motion be denied.

We cite the

National Bank vs. Insurance Company, 100 U. S., 43, in which it appeared that the record had not been

printed, and that counsel did not agree as to what the record contained:

> "We will not decide motions to dismiss before "the record is printed, where there is any ques- "tion about the facts on which the motion rests. "In order to get a decision before printing, "the motion papers must present the case in a "way which will enable us to act understandingly "without referring to the transcript on file."

Also *Waterville vs. Van Slyck*, 115 U. S., 290:

> "The judgment in this case is for less than "$5,000, but the record contains a certificate of "division. The motion to dismiss is on the "ground that this Court has no jurisdiction upon "such a certificate as has been filed herein. The "record has not been printed, and to get a de- "cision on a motion to dismiss before printing, the "motion papers must present the case in a way "which will enable us to act understandingly, with- "out referring to the transcript on file. In this "case we have not been furnished either with a "copy of the certificate on which the motion de- "pends or with an agreed statement of what it "contains. There is nothing on which we can act "unless we go to the transcript."

IV.

The merits involved in the present cases have not been adjudicated by this Court. This Court did de-

cide that the appellant was liable for the rentals of cars, repairs to cars, and destruction of cars, during certain periods; and thereupon the cases were remanded, to the end that decrees might be entered in accordance with the decision of this Court.

When the cases again came before the Circuit Court, the question was not whether the appellant should pay for the use of cars during the periods fixed by this Court, but the questions were, whether the cars were injured or destroyed within the periods fixed by this Court, what cars had been injured and what cars destroyed during the periods fixed, for the purpose of determining the amount to be paid by appellant to the appellee.

The appellant contended that the Court had no information, and that there was before the Court no evidence by which the facts could be established as to what cars were injured or destroyed within the periods fixed by this Court.

So that the same questions are not involved that have been decided by this Court upon the merits. The question decided by this Court, when the case was here, was as to whether appellant was liable for the payment of any rentals, or for any sum for repairs or destruction. Now the question is not whether he shall pay for repairs and destruction, but whether the repairs and destruction, for which the decree below was entered, occurred within the periods for which this Court held him liable; and this can only be determined by a reference to the evidence in the record upon the questions involved.

Consequently, we insist that this case does not come within Section 4 of Rule 26; especially when the ques-

tion as to whether a reversed decree bears interest is involved—the Court below having allowed, on a reversed decree, interest amounting to a sum far in excess of five thousand dollars.

V.

In this case there was given no sufficient notice under Rule 6, by which it is provided that:

"The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for plaintiff in error, or plaintiff of record in this Court, at least three weeks before the time fixed for submitting the motion."

In this case the notice was served on the 17th day of November, 1890, and is therefore not in accordance with the rule.

Respectfully submitted,

ROBERT G. INGERSOLL,
CLARENCE BROWN,
Solicitors for Appellant.

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Appellant,
vs.
GEORGE WILLIAM BALLOU, TRUSTEE, ET AL.,
Appellees.

Appeal from the Circuit Court of the United States for the District of Indiana.

BRIEF AND ARGUMENT IN BEHALF OF APPELLEES.

J L. HIGH,
COUNSEL FOR APPELLEES.

IN THE

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Appeal from the Circuit Court of the United States for the District of Indiana.

BRIEF AND ARGUMENT IN BEHALF OF APPELLEES.

STATEMENT.

This appeal is prosecuted by Sylvester H. Kneeland as purchaser under foreclosure sales of two divisions of the Toledo, Cincinnati and St. Louis Railroad, known as the Toledo and St. Louis divisions respectively, from a decree of the Circuit court for the district of Indiana, rendered June 21, 1890, which awarded to appellees the payment of certain sums for rental, repairs and destruction of cars and locomotives belonging to appellees, which had been used by the receiver of the railroad

pending the foreclosure proceedings. These causes have already been before this court, and were fully argued and determined upon the merits at the last term. *Kneeland* v. *American Loan & Trust Company* and *Kneeland* v. *Ballou*, 136 U. S., 89. The claims of appellees were presented by petitions of intervention in the foreclosure proceedings. The original decree in behalf of the appellees herein other than Ballou and the Railroad Equipment Company, was entered April 5, 1886 (Record, 2), and the original decree in behalf of appellees Ballou and the Railroad Equipment Company was entered November 9, 1889 (page 5). By these decrees the amounts found due to appellees were apportioned in two periods, the first period being from August 1, 1883, to August 1, 1884; the second period being from August 1, 1884, to January 1, 1885. The necessity for this division grew out of the fact that from August 1, 1883, to August 1, 1884, all of the eight divisions of the road lying within the States of Ohio, Indiana and Illinois were operated by the receiver as an entirety. On August 1, 1884, the five divisions of the road lying within the State of Ohio, having been sold under foreclosure proceedings in the Circuit court for the sixth circuit, were delivered to the purchasers, and the receiver thereafter operated only the remaining divisions, extending from Toledo to St. Louis, upon which the locomotives and cars of appellees were used during the ensuing five months. By the judgment of this court upon the former appeal, 136 U. S., 89, it was decided that the Circuit court erred in its original decrees by awarding to appellees rental for four months of the first twelve months period, namely, from August 1, 1883, to December 1, 1883, for the reason that the receivership during that time existed only under a judg-

ment creditor's bill, no receiver having been appointed under the foreclosure proceedings until December 1, 1883. This court accordingly held that the mortgage bondholders were not chargeable with rental for the use of our equipment during the receivership under the judgment creditor's bill, from August 1, 1883, to December 1, 1883, but were chargeable with all rentals thereafter. The cases were thereupon remanded to the Circuit court, with instructions as set forth in the mandate, as follows (pages 9 and 13): "And it is further ordered that this "cause be and the same is hereby remanded to the said "Circuit court, with directions to strike out all allowances "for rental prior to December 1, 1883, the time when the "receiver was appointed at the instance of the mort-"gagees, and to allow the rentals as fixed for the time "subsequent thereto."

Upon the filing of the mandates in the Circuit court, and on June 21, 1890, appellant filed a motion for a reference to a master. (Page 9.) The court denied the motion, and upon the same day entered a final decree (page 12) reducing the amounts found by the former decrees, by disallowing all allowances prior to December 1, 1883, and allowing all amounts found due for the remaining eight months of the twelve months' period, namely, from December 1, 1883, to August 1, 1884, and the amounts for the five months from the latter date to January 1, 1885, as found by the former decrees. The court further found (page 13) that, by reason of such reduction in the allowances for the first period, appellees were not entitled to interest upon the balances found due them for the eight months, and therefore refused to allow interest thereon. For the five months period, from August 1, 1884, to January 1, 1885, no change having

been made by this court in the original judgments, the Circuit court allowed interest on those amounts from the dates of the original decrees at six per cent. per annum. The appeal is brought to reverse this final decree of June 21, 1890.

December 1, 1890, a motion was made by appellees, whose judgments were less than $5,000 in amount, to dismiss the appeal as to them for want of jurisdiction. No action has yet been taken upon this motion, and it is assumed that it has been reserved until the final hearing.

By an error in making up or printing the transcript of the record, the figures showing the allowances made by the decree to various appellees, upon page 16 of the printed record, have been transposed from their proper place on page 15. The entire table of allowances to various appellees from the two divisions beginning with the ninth line from the top, and ending with the fifth line from the bottom of page 16, should be transposed to page 15 and inserted immediately after the fifteenth line of that page, following the allowance of $889.52 to Pennock Brothers from the Toledo division for the eight months. These figures appear correctly in the decree as printed in the motion to dismiss and to advance, filed herein by the undersigned, December 1, 1890.

Brief of the Argument.

It is difficult to argue temperately an appeal so utterly frivolous and devoid of merit as this. As to all appellees whose judgments are less than $5,000 in amount, the appeal must of course be dismissed for want of jurisdiction. The causes of action of the various appellees, although of like nature, were several and distinct in their character, and arose upon separate petitions of intervention, which, as a mere matter of convenience, were determined in the same general decrees. There was no unity of interest among the several appellees, each petition being an independent suit for the recovery of rentals. It is true that the aggregate amount found due to the appellee, R. S. Grant, from both the Toledo and the St. Louis divisions was $6,710.38. But in the case of Grant, as in that of all other appellees, his decree was made several against each of the divisions of the road, there being separate mortgages upon the different divisions, and separate foreclosure proceedings. The amount adjudged to the appellee, Grant, from the proceeds of the sale of the Toledo division was $3,436.78, and from the St. Louis division $3,273.60. These two amounts were decreed to be liens upon the two divisions, respectively, and are in effect separate judgments against those divisions. While, therefore, the aggregate of these two decrees exceeds $5,000, yet each separate allowance against the respective divisions being for less than the jurisdictional amount, the appeal cannot be entertained even as to him. As to all other appellees in behalf of whom the motion to dismiss was filed, even the aggregate amount of the decrees

in their favor against both divisions is less than $5,000, being as follows:

To the Railroad Equipment Company, from both divisions	$4,721 30
To the firm of Pennock Brothers, from both divisions	3,639 49
To the Erie Iron Company, from both divisions	181 98
To S. M. Carpenter, from both divisions	90 98

This court has so frequently held that decrees in favor of several creditors, each of which is for less than $5,000, although rendered in one general litigation, can not be grouped and blended for the purpose of giving this court jurisdiction upon appeal, that a mere citation of some of the later decisions will suffice upon this branch of the case.

Ex Parte Baltimore & Ohio R. Co., 106 U. S., 5.
Schwed v. *Smith*, 106 U S., 188.
Farmers' Loan & Trust Company v. *Waterman*, 106 U. S., 265.
Adams v. *Crittenden*, 106 U. S., 576.
Hawley v. *Fairbanks*, 108 U. S., 543.
Tupper v. *Wise*, 110 U. S., 398.
Stewart v. *Dunham*, 115 U. S., 61.

As to all other appellees there is but one point upon which there can be even the semblance or form of serious argument, namely, the allowance of interest on the five months period from the dates of the original decrees. It is true that appellant, upon the filing of the mandates in the court below, moved for a reference to a master, which was refused, and it will doubtless be insisted that such refusal was error. The purpose of appellant in moving for

a reference was so obviously and transparently to procure further delay that the motion scarcely merits serious attention. The entire record upon the original hearing with all the master's reports and exhibits and all necessary data for making the computation required by the mandates of this court were before the Circuit court. The direction of the mandates was plain and specific, namely, to reduce the allowances by striking out everything allowed prior to December 1, 1883, and to allow everything as found by the decrees thereafter. A mere mathematical calculation of the simplest character was all that was required to adapt the new decrees to the judgment of this court. The purpose of the reference sought by appellant could only have been to further protract an already protracted, vexatious and expensive litigation, and by the additional machinery of a reference to a master, the taking of further testimony and exceptions to the master's report, to still further delay appellees in the enforcement of their demands, whose justice had already been established by the judgment of this court. And, as evidencing the utter want of sincerity upon the part of appellant in moving for the reference, it may not be improper to state that, the motion being denied, counsel for appellant and the undersigned, with no more expensive judicial machinery than a sheet of paper and a lead pencil, in sixty minutes time made the entire computation necessary to adapt the former decrees to the judgment of this court, and the figures thus found were accepted by all parties as correct, and were embodied in the new decrees.

To the point that a reference should have been had to distribute the allowances for repairs and for cars destroyed to the exact months in which such liability occurred, if this were still an open question after the former appeal, it

would be sufficient to say that such distribution would undoubtedly be more prejudicial to appellant than the average method of distribution adopted by the master and by the court. The record upon the former appeal showed that most of the rolling stock was new, and had recently been delivered by appellees to the road at the time of the appointment of the receiver. It was, therefore, far less liable to deterioration and destruction, and there was far less need of repairs, during the four months of the receivership under the creditor's bill from August 1, 1883, to December 1, 1883, than for the remaining period in controversy. The master had originally reported to the Circuit court, and both the former decrees followed his reports in this respect, that the allowances for repairs and for the destruction of equipment should be averaged or distributed over the entire time. Four months allowances for these two items are thus thrown back upon the receivership under the judgment creditor's bill, while from the necessities of the case the actual depreciation from these causes during that time was necessarily much less than during the subsequent period. We, then, and not appellant, could alone be injured by this method of average distribution.

But aside from this suggestion, the propriety of this process of distributing the allowances for repairs, and for the destruction of equipment, is no longer an open question, having been concluded by the former appeal. The court in the present decrees merely adopted the same method of distribution which the master had recommended and the court pursued as the basis of the former decrees. If the propriety of this rule of distribution were erroneous, or had resulted in harm to appellant, it was his duty to assign error upon this point upon the former hearing; and under the familiar rule which has been fre-

quently affirmed by this court, the former judgment of this court is *res judicata*, not only upon all errors which were then assigned, but upon all which might have been assigned.

As still further illustrating the frivolous character of the motion for a reference and the evident purpose to secure delay by such motion, may be mentioned the fact that the motion itself recites, what we have never disputed, that no bill for the foreclosure of the mortgage upon the St. Louis division was ever filed until long after the appointment of the receiver over the entire system, and that no express order was ever made in the foreclosure suit upon the St. Louis division appointing a receiver over that division. Having thus recited in his motion a fact which was clearly apparent from the former record, and which was never disputed, but on the contrary was always conceded by appellees, appellant then gravely proceeds to move for a reference to a master to determine when the bill for the foreclosure of the St. Louis division was filed, having already fixed the dates by his motion, which also appeared by the record itself, and to ascertain and report whether any receiver was ever appointed in that case. If it may afford any consolation to appellant for the alleged error in the denial of his motion for a reference, we cheerfully stipulate here and now that the date of the filing of the bill by Edward F. Leonard, a bondholder, to foreclose the mortgage upon the St. Louis division was June 16, 1884, and that the bill by The Central Trust Company, as trustee, to foreclose the same mortgage was filed June 17, 1884.# We also stipulate that, although prayed by both bills, no receiver was by any formal order in these suits ever appointed over the St. Louis division, although these suits for the

Each of these bills avers that the Central Trust Company had already filed its bill to foreclose the same mortgage in the United States Circuit Court for the Southern District of Illinois, and procured the appointment of the receiver thereunder.

foreclosure of the mortgage upon that division were consolidated with each other and proceeded *pari passu* with the suit for the foreclosure of the mortgage upon the Toledo division in which the receiver had already been appointed. And by common consent of all parties the suits thereafter proceeded as an entirety, petitions, orders, receiver's reports, exceptions and other proceedings being entitled and taken in one or the other or in both causes indiscriminately. But upon these questions also appellant is concluded by the former judgment of this court. They were argued upon the former hearing, and were again more fully elaborated and argued in the petition for a rehearing filed by Mr. Ingersoll in behalf of appellant in May last, after the judgment of this court had been rendered upon the former appeals. Whether these questions were rightly or wrongly decided by this court upon the former hearing, they were decided, and that judgment is *res judicata*. We therefore decline argument upon these points.

There remains only the alleged error of the Circuit court in awarding to appellees interest upon their allowances for the five months from August 1, 1884, to January 1, 1885, such interest having been allowed by the Circuit court from the dates of the original decrees respectively in behalf of appellees. As appears by the findings of the Circuit court embodied in the decree of June 21, 1890, that court refused to allow such interest upon the balances remaining due as originally found for the first twelve months because that portion of the former decrees had been reversed, and the Circuit court had been instructed to reduce the amounts due for such period to appellees.

The Circuit court proceeded upon the theory, that

the amounts due us for the eight months being left unliquidated by the judgment of this court, and it requiring a new computation to strike the exact balance, we were not entitled to interest upon these amounts. But as to the allowances awarded us for the five months from August 1, 1884, to January 1, 1885, the Circuit court held, that this court having affirmed the original decrees in this respect, they remained as a fixed and absolute indebtedness due to appellees, which had been liquidated as of the dates of the original decrees, respectively, and affirmed by this court, and upon which we were entitled to interest. The case, therefore, stands precisely as if two judgments had been, as in substance they were, recovered by appellees originally, one for the twelve months which was reversed with directions to strike out the allowances for the first four months, and the other judgment for the five months which was in all respects affirmed. Indeed, it would have been perfectly competent for the Circuit court in the first instance to enter separate judgments for the two periods. The judgments were in substance and in legal contemplation separate judgments, being blended in one general decree as a mere matter of convenience to the parties and to the court. And this court having, by its judgment upon the former appeal, determined that the exact amounts allowed by the Circuit court for the five months' period were correct, has determined that these amounts were a specific and liquidated indebtedness due from appellant to appellees as of the dates of the original decrees, respectively. Interest, therefore, is properly allowable upon these amounts from the dates of the original decrees exactly as if the indebtedness had been upon a promissory note or a bond, as of those dates, and

the judgment establishing such indebtedness had been affirmed by this court.

So far from appellant having any just cause of grievance as to this allowance of interest, we might have properly appealed from the decrees for the refusal of the court to allow such interest upon the amounts due for the first period as reduced. The judgment of this court had established that we were entitled to these amounts as of the dates of the original decrees, but because this court decreed the reduction of these amounts by striking out the allowances for the first four months it was necessary to recast the account by deducting one-third of the amount of the entire judgment. The amounts remaining due us were thus, in effect, substantially liquidated by the judgment of this court, and a few minutes of computation was all that was necessary to ascertain the exact figures. Interest should, therefore, have been allowed us for the former period, but the court substantially split the difference between the parties by disallowing it for the former period and allowing it for the latter.

The allowance of interest for the five months was in exact accordance with the law of Indiana. By section 5199 of chapter 74 of the Revised Statutes of Indiana, 1888, it is provided as follows:

"Interest on judgments for money, hereafter rendered, shall be from the date of the return of the verdict or finding of the court, until the same shall be satisfied, at the rate per cent. agreed upon by the parties in the original contract, not exceeding six per cent.; and if there be no contract by the parties, at the rate of six dollars per year on one hundred dollars."

Under this statute the court would have been fully justified in allowing interest not only from the date of its former finding but from the return of the master's re-

port. If, then, the question is to be regarded as one depending upon the statutes of Indiana the section quoted affords ample warrant for the allowance of the interest.

The point which will doubtless be urged by counsel for appellant that a reversed judgment or decree cannot draw interest is sufficiently answered by the well-considered case of *McLimans* v. *The City of Lancaster*, 65 Wis., 240. The facts of the case are fully stated in the opinion, which is exactly in point, and is as follows:

"TAYLOR, J.: Upon a former appeal to this court in this case (63 Wis., 596), this court remitted the record with the following order: 'The judgment of the Circuit court is reversed, and the cause is remanded with directions that if the plaintiff, within thirty days after filing the *remittitur* in that court, shall remit in writing from the verdict all damages awarded thereby except $5,000, and file such remission with the clerk of the trial court, then judgment shall be entered in her favor, on the verdict and such remission, for the sum of $5,000 and costs. Failing to so remit there must be a new trial.'

The verdict in said action was for the sum of $8,000, and was rendered on the 12th of March, 1884, and judgment had been entered in favor of respondent for the said sum of $8,000 damages and costs, from which judgment an appeal had been taken to this court; so that at the time the order of this court was made the plaintiff had a judgment for $8,000 drawing interest from the 12th day of March, 1884. This court reversed the judgment solely on the ground that the damages awarded were excessive; and, in the opinion of this court, the verdict for damages should not have exceeded $5,000. It is clear, therefore, that had the damages been assessed at $5,000 by the jury, and judgment had been entered in her favor for that sum, the judgment would have been affirmed, and she would have received the interest on the sum of $5,000 from the date of the rendition of such verdict, viz.: 12th of March, 1884.

The respondent filed a remission for the sum of $3,000 from the damages awarded by the verdict, and entered

judgment for the sum of $5,000 with interest added from the 12th day of March, 1884, until the date of the judgment, together with the taxable costs of the action. From so much of this judgment as gives the respondent interest on the $5,000 from the date of the verdict to the time of the entry of the judgment, the city again appeals to this court.

The learned counsel for the appellant contend that the proper construction of the order of this court on the reversal of the judgment prohibits the respondent from including in her judgment any interest on the sum of $5,000 previous to the filing by the respondent of her remission of the said sum of $3000 as authorized by said order. This contention is based upon the last clause of the order, viz: 'Then judgment shall be entered in her favor on the verdict and such remission, for the sum of $5,000 and costs.' It is claimed that this is a specific direction limiting the amount for which judgment may be finally entered to the sum of $5,000 as the damages, and the ordinary taxable costs of the action, excluding any interest as a part of the costs. There may be some reason for the construction given to this direction by the learned counsel for the appellant, but we think in consideration of the fact that this court held that if the verdict had originally been for the sum of $5,000, this court would have approved the same, and affirmed the judgment rendered thereon, which would have included or given the respondent the benefit of the interest on that sum from the date of such verdict, she ought not now to be debarred from having such interest allowed to her, unless the language of the court clearly excludes her from having the same. The language of the order is that the judgment shall be entered in her favor, *on the verdict* and such remission, for the sum of $5,000 and costs. The verdict here referred to must be the verdict rendered March 12, 1884, and the remission is from the verdict of that date.

The direction to enter judgment on that verdict for the sum of $5,000 and costs should therefore be construed to mean to enter judgment upon the verdict for $5,000 rendered on the 12th of March, 1884; and, under the statute, a judgment rendered upon such verdict would entitle the plaintiff to add interest thereon from the date of

the verdict to the entry of judgment, and includes such interest in the taxable costs. Sec. 2,922 R. S., reads as follows: 'When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment is finally entered shall be computed by the clerk and added to the costs of the party entitled thereto.' Chap. 147, Laws of 1880, does not change this section in any respect; but simply adds a provision not at all affecting the right of the party to recover interest on a verdict as a part of the costs of the action.

The direction that the plaintiff may enter judgment for $5,000 and costs, construed as a part of the entire direction of this court, we think entitles the respondent to include the interest on the verdict in her judgment."

Howe v. *Jones*, 71 Iowa, 92, is also in point. In this case the controversy was as to the right of certain intervening creditors to a fund held by a receiver. Upon a former appeal (*Howe* v. *Jones*, 66 Iowa, 156), it had been held that the intervenors were entitled to certain funds, and that the receiver should pay them to the clerk of the court for their use. The judgment of the court below was then reversed and the cause was remanded for further proceedings in that court. Judgment was then entered in the court below requiring the receiver to pay to the clerk for the use of the intervenors the amounts found due, together with interest. The receiver appealed from this judgment, questioning the allowance of interest. The judgment was affirmed. BECK, J., delivering the opinion of the court, says (page 93):

"The receiver complains that interest was allowed by the order of the court below upon the money he was ordered to pay over. It was determined by the prior adjudication that the intervenors were entitled to this money. Since that adjudication he has retained the money, and resisted all efforts to obtain it by the intervenors. In law and in good conscience he ought to pay interest from the time the intervenors established their right to the money, and no more was allowed by the order of the court."

If the propriety of awarding interest were even a doubtful question, a single remaining suggestion of fact would seem to be conclusive upon this point. The sums adjudged to appellees as the result of a long, vexatious and expensive litigation are a part of the purchase price agreed to be paid by Kneeland for the two divisions of the road in question. By the fourteenth clause of the decree of foreclosure against the Toledo Division (see page 469 of the record in *Kneeland* v. *American Loan & Trust Company*, Number 252 of October Term, 1889), the purchaser was required to pay from time to time in cash, all amounts which might be decreed to be "payable upon court and receiver's indebtedness, and "to be prior and superior to the lien of said "first deed of trust and mortgage; said payments to "be made by the purchaser or purchasers upon twenty "days' notice by the masters, upon the order of the court "to that effect entered." A like provision was contained in the decree for the sale of the St. Louis division of the road. The masters' reports of the sale to Kneeland of both divisions were confirmed February 5, 1886, and it was ordered that the purchaser should be let into possession (see pages 532 and 533 of record in case of *Kneeland* v. *American Loan & Trust Company*, Number 252 of October term, 1889). The receiver was thereupon discharged, and Kneeland as purchaser took possession of both divisions of the road. He and his successors have for five years been in the full possession, management, operation and enjoyment of the property, with all its increments and earnings. Every dollar of the purchase price agreed by him to be paid for the two divisions was thus absolutely due and payable February 6, 1886. The effect of our decree was merely to divert from the mort-

gage bondholders that portion of the purchase money which the court found to be due to us. These allowances were an absolute indebtedness as purchase money due from Kneeland upon taking possession of the purchased property. He has, therefore, not only been in full possession and enjoyment of the property during all these years, but has retained for his own use and benefit a large portion of the purchase price. And to assert that he may thus retain possession both of the thing purchased and of the purchase money for a period of five years, without paying interest upon the latter, is a proposition so revolting that it may be dismissed without further discussion.

In view of the utterly frivolous grounds upon which the present appeal is based, and of the manifest purpose to use the appellate jurisdiction of this court to further delay appellees in the recovery of their long-deferred demands, we feel fully justified in asking the court to affirm the decree of the Circuit court, with ten per cent. damages, in accordance with the twenty-third rule.

Respectfully submitted.

J. L. HIGH,
Counsel for Appellees.

CHICAGO, January, 1891.

SUPPLEMENT.

Since printing the foregoing pages the undersigned has received (January 22, 1891) a copy of the printed brief and argument of Mr. John M. Butler, counsel for appellant. A few only of the more material misstatements of fact therein contained will be noted here.

Counsel for appellant correctly states that the decree itself of April 5, 1886, originally appealed from, only groups the amounts due to the appellees respectively, without in terms distributing these amounts among the various appellees for the respective periods. But the master's final report upon which this decree was based, filed February 23, 1886 (Record No. 252 of October term, 1889, page 538), makes the distribution as between the respective appellees in detail for the two periods, giving the amounts due to each of the appellees for the twelve months and for the five months separately. The undersigned actually prepared and tendered to the court on April 5, 1886, a draft of a decree exactly following the master's report in this respect, and distributing the amounts among the various appellees by name, for the two periods, exactly as the master had done. Mr. Butler strenuously objected to this form of decree, and for the purpose of making the figures exceed $5,000, so that the entire decree would be appealable, he tendered a draft of a decree grouping and blending the amounts without distinction as to the various appellees. At his earnest solicitation and request, the court adopted his draft and rejected mine. But the decree of April 5, 1886, in this respect is to be con-

sidered in connection with the master's report, the details of which are combined and blended in that decree; and the necessary reduction in the allowance for the twelve months period as required by the mandates of this court were easily made from the master's report, showing the exact allowances to each appellee for the two periods.

Counsel for appellant also states that the decree of November 9, 1889, in favor of Ballou is similar to the decree of April 5, 1886, in this respect. This statement is incorrect as will appear by an inspection of the decree of November 9, 1889. (Record, No. 1,537 of October term, 1889, page 33.) In that decree, as prepared by the undersigned and entered by the court, the amounts due to the appellees Ballou and the Railroad Equipment Company respectively are segregated for the two periods of twelve and five months, and in making the necessary reduction in the twelve months allowances to conform to the mandate of this court, it was only necessary to reduce the twelve months allowances by one-third, leaving the five months allowances unchanged, which was accordingly done.

Mr. Butler also asserts that "the entire rentals and repairs of all of the rolling stock and equipment of all of these appellees was charged against the single line of railroad from Toledo, Ohio, to East St. Louis, Illinois, from August 1, 1884, to January 1, 1885, utterly regardless of the fact that the main line from Toledo to East St. Louis could not and did not use anything like all this rolling stock and equipment during that five months." This assertion is repeated in various forms throughout the brief. So gross a misstatement of the actual fact could have been inspired by but one of two

causes; either a profound ignorance of the record, which can seldom be charged against the learned counsel, or a deliberate purpose to mislead the court.

It is true that in the original report of Master Fishback, filed December 7, 1885 (record No. 252 of October term, 1889, page 488), the master made the exact mistake above suggested. It is equally true, and counsel for appellant should have had the candor to advise this court of the fact that, the attention of the master having been called to this error, he promptly and voluntarily corrected it. In the report of Mr. Fishback filed December 28, 1885 (record No. 252, of October term, 1889, page 506), the correction is made. Upon this point the master, in his corrected report, says:

"After the filing of my report herein on the 7th day of December, 1885, I discovered that I had made a mistake as to the meaning of so much of the order of reference as required me to report the amounts due for repairs, rentals and for cars destroyed during the five months from August 1, 1884, to January 1, 1885. In my former report above alluded to and in the schedules filed therewith I have charged to the three divisions remaining in the hands of the receiver after the first of August, 1884, five-seventeenths of the entire amount which should be paid for rentals, repairs and cars destroyed of the entire equipment which was in the possession of the receiver during the twelve months from August 1, 1883, to August 1, 1884. I should have charged upon said three divisions remaining in the hands of the receiver after August 1, 1884, the rentals for cars and engines actually in the possession of the receiver during the five months above named, to which should be added five-seventeenths of the amount due for repairs and for cars destroyed."

"This will make no change in the amounts reported as due and to be paid by the eight divisions which were in the possession of the receiver up to August 1, 1884."

"I file herewith Schedule 'R' No. 2, which contains a statement of the amounts due the different owners of

cars and engines according to the corrected computation."

Then follows a tabulated statement making the necessary reductions for the five months term as to the allowances due to each of the appellees to correspond with the equipment actually remaining in use by the receiver upon the line from Toledo to St. Louis after the sale of the Ohio divisions and their delivery to the purchaser August 1, 1884. And, in the master's report in the Ballou case (record No. 1,537 of October term, 1889, pages 22, 23 and 24) and in the schedules accompanying it, he allows rentals for the use of only such equipment as was in the possession of the receiver for the respective periods of twelve and five months in question.

Again, it is stated that the amounts allowed in the decree of June 21, 1890, from which the present appeal is taken, were reached "by deducting from the amount orig-"inally decreed due to each of these appellees four-"seventeenths." No one knows better than the counsel who penned this statement, its incorrectness. He himself, and the undersigned, sitting side by side in his office, each made a separate computation, reducing the twelve months allowances by subtracting one-third thereof, and the figures thus compared and agreed upon were inserted in the decree. But one-third of the twelve months is not four-seventeenths of the seventeen months, since, as already shown, the master had reduced his original findings for the last five of the seventeen months to correspond with the reduced amount of equipment retained by the receiver after the sale of the Ohio divisions. It is true that Mr. Butler elsewhere in his brief states the fact correctly, that we made the reduction in the twelve months period by deducting one-third therefrom, but the statement that the result

was obtained by deducting four-seventeenths is repeated so frequently throughout the brief that its correction has been deemed necessary.

At pages 36 and 37 of his brief counsel repeats the statement that the original decrees in favor of appellees are for a single sum of money, "for the entire period of "seventeen months, from August 1, 1883, to January 1, "1885." As has already been pointed out, this statement is partly true and partly untrue. The decree of April 5, 1886, while not in terms making the distribution between the various appellees for the two periods, does give the aggregate amounts as based upon the master's report, which did make the distribution for the two periods in detail, and the decree of November 9, 1889, in favor of Ballou and the Railroad Equipment Company, made specific distribution for the two periods to both of these appellees. All necessary data were thus before the Circuit court to enable it to execute the mandates of this court. The mandates directed the Circuit court to strike out all allowances for rental prior to December 1, 1883, "and to allow the rentals as fixed "for the time subsequent thereto." The decree of April 5, 1886 (record No. 252 of October term, 1889, pages 571, 572), while not fixing the amounts in detail due to each appellee respectively for the different periods, did fix the amounts due from Kneeland to all the appellees for four different periods, namely: for six months prior to August 1, 1883; for four months from August 1, 1883, to December 1, 1883; for eight months from December 1, 1883, to August 1, 1884, and for five months from August 1, 1884, to January 1, 1885. And in the master's report upon which this decree was based, these amounts thus grouped for the four different periods are segregated

among the various appellees, and in the Ballou decree of November 9, 1889, as already shown, the segregation and division, as between the two appellees, for the twelve months and five months are expressly made upon the face of the decree. No reference to a master and no master's report could have fixed the allowances for the five months more specifically than they were already fixed, and this court having imperatively required the Circuit court to "allow the rentals as fixed for the time subsequent "thereto," there remained upon the part of the Circuit court only the ministerial duty of registering the mandates of this court by again allowing the amounts as thus fixed. The direction, therefore, of this court, to allow "the rentals as fixed" for the five months, has precisely the effect of an affirmance of the original decrees for the five months. Being thus affirmed, they are affirmed as of their original dates, and the allowance of interest thereon from those dates follows as of course.

Counsel also states that "the master never in any re-"port or schedule made any attempt to separate the Dwight "receivership of four months—from August 1, 1883, "to December 1, 1883—from the entire period of seven-"teen months, while the decision and mandates of this "court required just that severance to be made." Referring again to the master's report of February 23, 1886, (record No. 252, October term, 1889, page 541) it will be seen that the master did exactly what counsel says he did not do, namely, separate the period from August 1, 1883, to December 1, 1883, and that he stated the gross amounts due from both divisions for these four months, without, however, apportioning these gross amounts among the various appellees.

At page 48 of his brief, referring to the suits brought

by Leonard as a bondholder, June 16, 1884, to foreclose the mortgage on the St. Louis division, and by the Central Trust Company brought June 17, 1884, to foreclose the same mortgage, and afterward consolidated, it is stated that a receivership was not asked in those bills. Let the record upon this point speak for itself. The prayer for relief in the Leonard bill (record No. 252 of October term, 1889, page 151) contains the following:

"That pending this suit a receiver may be appointed according to the course and practice of this court, with the usual powers of receivers in like cases, of all and singular of the mortgaged property and premises, and the property, franchises, equitable interests, things in action, effects, moneys, receipts, bills, incomes, earnings, rights, privileges, and immunities of said company connected with or relating to said mortgaged premises, and of all the rolling stock, machinery, equipment, and other property incident to the same; that said several railroad corporations may be ordered and directed to transfer and deliver to said receiver all the property, real and personal, and all contracts, records and papers, bills, books of account, deeds, evidences, and muniments of title of or pertaining to said railroad in their respective hands or possession, and that said receiver may be authorized and directed to maintain and operate said railroad, and to keep the same in proper repair, and to receive, collect and preserve all the property, assets and income mentioned or described and included in said first mortgage of said Toledo, Cincinnati and St. Louis Railroad Company, and that such other orders or directions may be made in respect to said receivership as may be equitable and proper," etc.

The bill in the suit of the Central Trust Company (record No. 252, October term, 1889, pages 167, 168), contains a similar prayer for the appointment of a receiver, copied word for word from the prayer in the Leonard bill, above quoted. #

Argument is respectfully declined upon the comical

And the receiver had already been appointed in a similar suit by the Central Trust Company in the United States Circuit Court for the Southern District of Illinois, to foreclose the St. Louis division mortgage (Record No. 252 of October term, 1889, pages 145, 161)

affidavit of Mr. Kneeland based upon information and belief, as to conjectural statements of hypothetical witnesses whose names are not given, which affidavit was filed in the nature of a petition for a rehearing in the case of the American Loan and Trust Company, September 27, 1890, and more than four years after the decree of April 5, 1886, which it was sought to re-open. And for the reasons already given, the court is respectfully asked to dismiss the appeal as to all appellees whose demands are less than $5,000, and to affirm the decree with damages as to all others; *ut sit finis litium.*

Respectfully submitted.

J. L. High,
Counsel for Appellees.

Chicago, January 24, 1891.